Filed 7/13/20 In re Hernandez CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ANGELA HERNANDEZ On Habeas Corpus.	F076752 (Super. Ct. Nos. HC15330A & BF150639A)

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Steven M. Katz, Judge.

Law Office of Jacob M. Weisberg and Jacob M. Weisberg for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Smith, J. and DeSantos, J.

Angela Hernandez (appellant) appeals from the denial of her application to vacate a conviction due to inadequate advice about immigration consequences. We affirm.[1]

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[1] As will be described, *post*, appellant sought relief in the trial court by means of a petition for writ of habeas corpus. In a noncapital case, a habeas petitioner cannot appeal from an order denying relief, but rather must file a new petition in a higher court. (Pen. Code, § 1506; *In re Reed* (1983) 33 Cal.3d 914, 918, fn. 2, overruled on another ground in *In re Alva* (2004) 33 Cal.4th 254, 264; *In re Hochberg* (1970) 2 Cal.3d 870, 875, disapproved on another ground in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3; cf. Pen. Code, § 1509.1; *Briggs v. Brown* (2017) 3 Cal.5th 808, 825.) Appellant did not do so, but instead filed a notice of appeal in a timely manner following the trial court's ruling.

When apparently informed by a clerk of the Kern County Superior Court that the notice of appeal was improper since the trial court denied the petition for writ of habeas corpus, counsel for appellant (who also represents her on appeal) explained that the case essentially converted from a habeas action to a motion to vacate appellant's conviction pursuant to Penal Code section 1473.7, and that the notice of appeal was filed with respect to the trial court's denial of the motion to vacate pursuant to that statute. (Further statutory references are to the Penal Code unless otherwise stated.) An order granting or denying relief under section 1473.7 is appealable, pursuant to section 1237, subdivision (b), as an order after judgment affecting a party's substantial rights. (§ 1473.7, subd. (f).) An appellant is not required to obtain a certificate of probable cause as a prerequisite to the appeal. (See *People v. Arriaga* (2014) 58 Cal.4th 950, 960.)

Appellant was on probation at the time she first filed her habeas petition. At that time, habeas was the proper means by which to raise her claims. (See § 1473; *In re Hernandez* (2019) 33 Cal.App.5th 530, 542.) Since appellant was still considered to be legally under restraint, section 1473.7 was not applicable to her. (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 221.) By the time the trial court incorporated section 1473.7 into the habeas proceedings, however, it appears appellant was no longer on probation. This in turn appears to have led to a confused and confusing merger of the writ and statutory proceedings, although it did not deprive the trial court of jurisdiction over the habeas proceedings. (*In re Hernandez*, *supra*, 33 Cal.App.5th at p. 542.)

Whether cast as being raised in a new habeas proceeding in this court or after denial of a statutory motion to vacate, appellant's claims are reviewable by us on the merits. The Attorney General does not contend otherwise, nor does he challenge the manner in which appellant now presents those claims. Accordingly, we allow the appeal to proceed as such while maintaining the habeas captioning of our opinion.

FACTS AND PROCEDURAL HISTORY

On September 9, 2013, appellant was charged by complaint with sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a); count 1) and possession of marijuana for sale (*id*., § 11359; count 2). According to the probation officer's report, which in turn summarized law enforcement reports, a confidential informant told Kern County Sheriff's deputies that appellant wanted to sell to the informant 105 pounds of marijuana at $900 per pound, and that they had agreed to meet at a store in Delano on August 16, 2013. On that date, law enforcement officers were at the location and, when appellant arrived, they took her into custody. A search of the vehicle in which appellant was the sole occupant revealed five black trash bags containing approximately 105 pounds of processed marijuana. Appellant admitted having approximately 100 pounds of marijuana in the vehicle, and said she would be making $2,000 for it. She said she would be receiving the money for delivering the marijuana, not for selling it. She said the man who told her to deliver it placed the marijuana in her vehicle in a grape vineyard. She admitted being present when the marijuana was loaded into her vehicle, but denied it belonged to her. She said she had her own marijuana — approximately 49 plants and about a pound of processed marijuana — at her residence, and that she had a marijuana recommendation card.

On October 31, 2013, pursuant to section 859a, appellant pled guilty or nolo contendere to both counts of the complaint on condition that she serve 180 days in custody.[2] As part of the change of plea process, appellant initialed the applicable paragraphs of the "Felony Advisement of Rights, Waiver and Plea Form," including the following provision:

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[2] The minutes of the hearing reflect appellant changed her plea, with respect to both counts, to nolo contendere and was then found guilty by the court. The reporter's transcript of the change of plea hearing shows appellant pled guilty to both counts. The discrepancy is immaterial for purposes of this appeal.

> "2. **ALIEN STATUS**: I understand that if I am not a Citizen of the United States, my guilty or no contest plea will result in my deportation, exclusion from admission to the United States, and denial of naturalization under the laws of the United States. **Deportation is mandatory for some offenses. I have fully discussed this matter with my attorney and understand the serious immigration consequences of my plea**." (Boldface in original.)

Appellant signed a declaration under penalty of perjury that she had read, understood, and initialed each item, and that everything on the form was true and correct. Appellant's attorney, J.M. Irigoyen, signed a statement that he had reviewed the form with his client and explained the direct consequences that would result from a plea of guilty or no contest, including "any possible immigration consequences that may result from this plea," and that he was satisfied his client understood "these things." The form also contained a statement signed by an Spanish-language interpreter, attesting that the interpreter had been sworn or had a written oath on file, and certifying that the interpreter translated the entire form to appellant; appellant stated to the interpreter that she understood the contents of the form; and appellant initialed and signed the form in the interpreter's presence.

At the change of plea hearing, appellant was assisted by a certified Spanish language interpreter. In response to the trial court's inquiry, appellant acknowledged that she signed, dated, and initialed the form; she understood everything on that form; and she did not have any questions about what could happen if she entered a plea.

On January 3, 2014, imposition of sentence was suspended as to count 1, and appellant was placed on probation for three years on various terms and conditions, including that she serve 180 days in jail. Sentence on count 2 was stayed pursuant to section 654.

On December 6, 2016, appellant filed a petition for writ of habeas corpus, alleging her conviction should be vacated, and she should be allowed to withdraw her plea, because she received ineffective assistance of counsel based on defense counsel's failure to advise her of the adverse immigration consequences that could result from her plea.

Appellant, a citizen of Mexico and lawful permanent resident of the United States, asserted she was now facing removal (deportation) as a result of her plea, and that she would have exercised her right to a jury trial had she been aware of the immigration consequences at the time she pled nolo contendere.[3]

On January 26, 2017, appellant's petition was denied. The trial court ruled it had no jurisdiction to adjudicate the petition, since appellant was no longer in actual or constructive custody; hence, under section 1474, there was no habeas corpus remedy as a matter of law.

Appellant moved for reconsideration, in part on the ground the court failed to take into account section 1473.7, which took effect on January 1, 2017, and permitted a person no longer in custody to prosecute a motion to vacate a conviction. In response, the trial court reopened the habeas proceeding.

On September 27, 2017, an evidentiary hearing was held. The court took judicial notice of its file in appellant's underlying criminal case. It also took judicial notice of federal documents seeking appellant's deportation.[4]

At the hearing, appellant testified that she was currently 59 years old, came to the United States when she was 19 years old, and became a lawful permanent resident in 1985. She was married; she had five children in the United States, three of whom were lawful permanent residents and two of whom were citizens. She had 14 grandchildren, and took care of two of them three times a week. Her mother was deceased, but her father resided in Fresno.

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3 We use the terms "deportation" and "removal" interchangeably.

4 The prosecutor objected, on hearsay grounds, to declarations submitted by appellant and her current attorney. The court agreed the declarations were hearsay and stated it would not consider the one it read before becoming aware of the People's objection.

Following her arrest in 2013, appellant retained Attorney J.M. Irigoyen, who passed away prior to the current proceedings. During the course of his representation, she advised him that she was a lawful permanent resident. She pled guilty to the charges because Irigoyen told her that she had to. He did not tell her that if she pled guilty, she would almost certainly be deported. Had he told her that, she would have gone to trial, because she did not want to be sent to Mexico. Appellant acknowledged her signature and initials were on the "Felony Advisement of Rights, Waiver and Plea Form," but she did not recall going over it with Irigoyen before she entered her plea, and the paragraph about alien status was never read to her. She was never told she could be deported. The document was never read to her. Irigoyen told her to sign and initial it. She did not recall having an interpreter read the document to her, or the court asking if she understood everything on the form. She never thought there was anything on the form concerning deportation. Irigoyen, who did not speak Spanish, never brought an interpreter to talk to her. The only time she talked to an interpreter was in court, never outside of court.

On October 16, 2017, the trial court denied the petition for writ of habeas corpus. In its written ruling, the court noted it was unable to hear testimony from Irigoyen; however, in opposition to appellant's testimony, the court had a record of what Irigoyen did by virtue of the plea form, change of plea transcript, and the court file. The court summarized those documents, and found the plea form and plea colloquy indicated Irigoyen properly advised appellant regarding the immigration consequences of entering a plea. The court also observed that at the time of sentencing, appellant was advised she could not reenter the United States without proper authorization, and she signed her terms and conditions of probation, which also contained such an advisement. The court found the foregoing "belie[d]" appellant's claim that she entered her plea without proper immigration advice. The court concluded appellant's claims were post hoc assertions that were contradicted by the record of the plea.

Appellant moved for reconsideration or modification of the order on the grounds the trial court failed to adjudicate her motion to vacate her conviction pursuant to section 1473.7, and did not address whether she had the ability meaningfully to understand, defend against, or knowingly accept the actual potential immigration consequences of her plea. She also argued the court failed to rely on applicable state and federal law.

On November 6, 2017, the court denied the motion for reconsideration. It concluded the evidence before it failed to show the conviction was legally invalid within the provisions of section 1473.7, subdivision (a)(1). Accordingly, it also denied appellant's application to vacate the conviction pursuant to that statute.

DISCUSSION

California has long required that when a defendant in a criminal case is considering pleading guilty or no contest, he or she must be advised of the potential immigration consequences of such a plea. Thus, section 1016.5, subdivision (a) has provided, since its enactment in 1977: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, . . . the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." If the advisement is not given and the defendant shows conviction of the offense to which he or she pled may have one of the specified consequences, the court, on defendant's motion, is required to vacate the judgment and permit the defendant to withdraw the plea of guilty or no contest and enter a plea of not guilty. (*Id*., subd. (b).)

Because the statutory advisement only tells a defendant a conviction *may* have specified immigration consequences, the giving of the advisement does not bar a noncitizen defendant from moving to withdraw a plea based on ignorance of his or her specific immigration consequences. (*People v. Patterson* (2017) 2 Cal.5th 885, 889; see

§ 1018.) As the California Supreme Court has observed: "[F]or many noncitizen defendants deciding whether to plead guilty, the 'actual risk' that the conviction will lead to deportation — as opposed to general awareness that a criminal conviction 'may' have adverse immigration consequences — will undoubtedly be a 'material matter[]' that may factor heavily in the decision whether to plead guilty. [Citations.]" (*Patterson*, *supra*, at p. 896.) Moreover, "receipt of the section 1016.5 advisement does not bar a criminal defendant from challenging his conviction on the ground that his counsel was ineffective in failing to adequately advise him about the immigration consequences of entering a guilty plea. [Citation.]" (*Id*. at p. 896.)

In general terms, to succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that but for counsel's errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

The United States Supreme Court addressed the intersection between advisement of immigration consequences and the effective assistance of counsel in criminal prosecutions in *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*). The high court noted that changes in federal immigration law had made deportation virtually inevitable for noncitizens convicted of particular classes of criminal offenses; hence, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important," as removal is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. (*Id*. at p. 364.)

Addressing *Strickland*'s first prong, the court concluded: "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. [Citations.]" (*Padilla, supra*, 559 U.S. at p. 367.) The court acknowledged immigration law can be complex. Accordingly, it determined,

"When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it [is in cases involving all controlled substances convictions, for which removal is presumptively mandatory except for the most trivial marijuana possession offenses], the duty to give correct advice is equally clear." (*Id*. at p. 369, fn. omitted.) The high court did not decide whether Padilla had shown prejudice under *Strickland*'s second prong, as required to entitle him to relief on his claim. (*Padilla*, *supra*, at p. 369.) It noted, however, that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. [Citation.]" (*Id*. at p. 372.)

Padilla was decided before appellant pled guilty in the present case to what clearly was a presumptively deportable offense. (See, e.g., 8 U.S.C. § 1227(a)(2)(B)(i).) Subsequently, effective January 1, 2016, the Legislature codified *Padilla* and related California case law. (§ 1016.2, Stats. 2015, ch. 705, § 1.) At the same time (Stats. 2015, ch. 705, § 2), it mandated that defense counsel provide "accurate and affirmative advice" about the immigration consequences of a proposed disposition and defend against those consequences (§ 1016.3, subd. (a)), and that the prosecution consider avoidance of immigration consequences in the plea negotiation process (*id*., subd. (b)). The Legislature made it clear, however, that the new requirements did not change the requirements of section 1016.5. (§ 1016.3, subd. (c).)

The Legislature followed the statutory codification of *Padilla* with the enactment, effective January 1, 2017, of section 1473.7. (Stats. 2016, ch. 739, § 1.) As it existed at the time of the proceedings in the present case, section 1473.7 provided, in pertinent part: "(a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction . . . for . . . the following reason[]: [¶] (1) The conviction . . . is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully

understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere."

Effective January 1, 2019, the Legislature added the following clarification to subdivision (a)(1) of section 1473.7 (Stats. 2018, ch. 825, § 2): "A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." (See *People v. Mejia* (2019) 36 Cal.App.5th 859, 861-862.) In her reply brief, appellant relies on this amendment to assert that her case "does not fall simply on whether or not the Superior Court has made a proper finding of ineffective assistance of counsel. The broader question before this court is whether under the circumstances of this case, and consistent with the interests of justice and the findings and declarations made in section 1016.2 of the Penal Code, . . . the Appellant met the standard for legal invalidity now required by P.C. §1473.7."[5]

Because the amendment is a clarification of existing law, at least two Courts of Appeal have held — one with the agreement of both parties — that it applies to nonfinal judgments. (*People v. Mejia, supra,* 36 Cal.App.5th at p. 865; *People v. Camacho, supra,* 32 Cal.App.5th at p. 1007.) In the trial court, appellant argued ineffective assistance of counsel, but also based her claim on the grounds of section 1473.7, subdivision (a)(1). Accordingly, even though her motion was based on errors by her counsel at the time she pled guilty, she need not establish a Sixth Amendment violation

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5 As a general proposition, points raised for the first time in a reply brief will not be considered unless good reason is shown for failure to present them earlier. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873; see *People v. Carrasco* (2014) 59 Cal.4th 924, 990.) While appellant could not have addressed the amendment in her opening brief, which was filed before the amendment went into effect, she should have requested permission to file a supplemental brief, rather than raising the issue in a reply brief or under the guise of supplemental authorities. (See *People v. Mejia, supra,* 36 Cal.App.5th at p. 865; *People v. Camacho* (2019) 32 Cal.App.5th 998, 1000.) We have not requested supplemental briefing from either party, however, because the recent legislation merely clarifies the law as it has always existed, and our conclusions are not affected by the clarification.

under *Strickland* standards. (*People v. Camacho*, *supra*, 32 Cal.App.5th at p. 1008.) Rather, "to establish a 'prejudicial error' under section 1473.7, [appellant] need only show by a preponderance of the evidence: (1) [s]he did not 'meaningfully understand' or 'knowingly accept' the actual or potential adverse immigration consequences of the plea; and (2) had [s]he understood the consequences, it is reasonably probable [s]he would have instead attempted to 'defend against' the charges." (*People v. Mejia*, *supra*, 36 Cal.App.5th at p. 862.)

At all times, section 1473.7, subdivision (e)(3) has provided that if the court grants the motion to vacate the conviction, the court shall permit the moving party to withdraw his or her plea of guilty or no contest. A decision whether to deny a motion to withdraw a guilty or no contest plea is reviewed for abuse of discretion (e.g., *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254), as is a motion to vacate a conviction under section 1016.5 (e.g., *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192). Insofar as a motion to vacate a conviction under section 1473.7 is based on a claim the defendant was deprived of the constitutional right to the effective assistance of counsel, however, the matter is subject to our independent review. (*People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1132; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 975; *People v. Tapia* (2018) 26 Cal.App.5th 942, 950; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116; *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.) Even when applying the de novo standard of review, we defer to the trial court's factual determinations if they are supported by substantial evidence, i.e., evidence that is reasonable, credible, and of solid value. (*People v. Tapia*, *supra*, 26 Cal.App.5th at p. 951; *People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1116.) The trial court is the trier of fact and the judge of the credibility of witnesses and/or affiants (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533, superseded by statute on another ground as stated in *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207, fn. 5), and "[w]e do not reweigh the evidence or reevaluate witness credibility" (*People v. Tapia*, *supra*, 26 Cal.App.5th at p. 951).

Whatever Irigoyen's omissions may or may not have been, appellant has not established, by a preponderance of the evidence, the prejudice prong of *Strickland* (see *In re Scott* (2003) 29 Cal.4th 783, 811) or, with respect to section 1473.7, subdivision (a)(1), that prejudicial error damaged her ability to meaningfully understand or knowingly accept the immigration consequences of her plea. The written plea form advised, in no uncertain terms, that appellant's guilty or no contest plea *would* result in her deportation, exclusion from admission to the United States, and denial of naturalization under the laws of the United States.[6] Irigoyen, an officer of the court, attested that he had reviewed the form with appellant and explained any possible immigration consequences, and he was satisfied she understood. An interpreter, who had a written oath on file, certified having translated the entire form to appellant, and that appellant stated she understood the form's contents. Appellant declared, under penalty of perjury, that she understood each item. She verbally acknowledged to the court, during the change of plea hearing, that she signed the form and understood everything on it, and that she did not have any questions concerning what could happen if she pled guilty.

This is not a case in which a defendant was advised his or her plea *may* or *could* have the consequence of deportation (see *People v. Ruiz* (2020) 49 Cal.App.5th 1061, 1063, 1065-1066; *People v. Mejia*, *supra*, 36 Cal.App.5th at p. 863; *People v. Camacho*, *supra*, 32 Cal.App.5th at p. 1001; see also *People v. Patterson*, *supra*, 2 Cal.5th at

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6 Where section 1016.5 is concerned, "[a] court 'may rely upon a defendant's validly executed waiver form as a proper substitute for personal admonishment.' [Citation.]" (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 175; see *People v. Araujo* (2016) 243 Cal.App.4th 759, 762; *People v. Quesada*, *supra*, 230 Cal.App.3d at pp. 535-536.) We see no reason a court passing upon a claim of ineffective assistance of counsel or a motion to vacate brought pursuant to section 1473.7, cannot similarly rely on the form as evidence concerning advisements given the moving party in such a proceeding. Regardless of whether an advisement from a source other than defense counsel is relevant to the question whether counsel's performance was deficient (see *U.S. v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 787), it is manifestly relevant to the issue of prejudice (see *U.S. v. Kayode* (5th Cir. 2014) 777 F.3d 719, 728-729).

p. 898), nor is it one in which a defendant for whom the possibility of deportation was a determining factor in deciding whether to plead guilty was erroneously advised or led to believe the plea *would not* subject him or her to deportation (see *Lee v. United States* (2017) 582 U.S. ___, ___, ___, ___-___ [137 S.Ct. 1958, 1962, 1963, 1965-1967]; *People v. Camacho*, *supra*, 32 Cal.App.5th at p. 1001). Rather, the immigration consequences were clear, and the advisement given to appellant was equally clear. (See *People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1117; *People v. Perez* (2018) 19 Cal.App.5th 818, 829-830.)[7]

The trial court's implied finding that appellant's post hoc assertions lacked credibility in light of the contemporaneous record of her plea (see *Lee v. United States*, *supra*, 582 U.S. at p. ___ [137 S.Ct. at p. 1967]), is supported by substantial evidence. (See *People v. Tapia*, *supra*, 26 Cal.App.5th at pp. 951-953.) Exercising our independent review while accepting the trial court's credibility determination and factual findings, we conclude appellant is not entitled to have her conviction vacated.

DISPOSITION

The order is affirmed.

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[7] "The admonition was boilerplate, but it was unequivocal and accurate." (*People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1117.)